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IN THE
COURT OF APPEALS OF INDIANA

DAVID A. DONLAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A04-0605-CV-258
	)	
SARA DONLAN,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mary Ann Oldham, Judge
Cause No. 49D02-9906-DR-819

January 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Donlan appeals the trial court's order denying his request to modify legal custody of his two children and modifying physical custody in favor of Sara Donlan. We affirm.

Issues

David raises four issues for our review, which we restate as:

I. whether the trial court properly denied his motion to modify legal custody;

II. whether the trial court properly granted Sara's motion to modify physical custody;

III. whether the trial court modified his parenting time without considering Indiana Code Section 31-17-4-2; and

IV. whether the trial court should have treated David's motion to modify legal custody as a request to limit Sara's authority as legal custodian.

Facts

David and Sara were married and have two minor children—H.D., who was born on March 24, 1994, and T.D., who was born on June 11, 1998. On June 28, 2000, the trial court entered a decree of dissolution of marriage and awarded Sara full legal custody of H.D. and T.D. and awarded David and Sara joint physical custody. Pursuant to the terms of the divorce decree, the children resided with David and Sara during alternating weeks, and the non-residential parent for a given week visited the children on Tuesday evening.

On October 15, 2004, David filed a motion requesting that the trial court grant him sole legal custody of H.D. and T.D. At some time during the evidentiary hearings, Sara apparently made a motion to modify child support and physical custody. On April 19, 2006, the trial court denied David's motion to modify legal custody and granted Sara's motion to modify physical custody. In doing so, the trial court ordered David to have parenting time as dictated by the guidelines plus alternating weekend parenting time extending to Monday morning and over night parenting time midweek. David appeals.

Analysis

In general, we review custody modification decisions for an abuse of discretion, and grant trial judges latitude and deference in family law matters. Green v. Green, 843 N.E.2d 23, 27 (Ind. Ct. App. 2006). When we review a trial court's determination regarding custody modification, we may not reweigh the evidence or judge witness credibility. Id. Further, we only consider the evidence and any reasonable inferences that can be drawn therefrom in the light most favorable to the judgment. Id.

Where, as here, the trial court enters sua sponte findings of fact, we review those findings under the same standard we would use if the parties requested them. Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003). That is, we must determine whether the evidence supports the findings and whether the findings support the conclusions. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). We may affirm a judgment based on any legal theory that is supported by the findings. Nunn, 791 N.E.2d at 783. A judgment will be reversed only if it is clearly erroneous, meaning that the record lacks any evidence or reasonable inferences from the evidence to support the

judgment. Id. The trial court's sua sponte findings control only as to the issues they cover, however, and a general judgment standard controls as to the issues upon which the court has not made findings. Walker v. Elkin, 758 N.E.2d 972, 974 (Ind. Ct. App. 2001).

The trial court's findings and conclusions, as they relate to David's and Sara's requests to modify legal and physical custody, provide:

I. FINDINGS OF FACT

* * * * *

> 4. There is no question that the parties have had difficulty in communicating with each other, and although the Court will not set forth all of the evidence, testimony, exhibits, etc. that reflect the communication problems that the parties have encountered, the Court does find that joint legal custody, as defined under existing Indiana Law, is not appropriate in this particular case.
>
> 5. As set forth in the preceding finding, although the parties have had numerous disputes regarding various issues involving the Children, the primary matter that has resulted in the matters being litigated relates to a dispute between the parties concerning the proper and appropriate medical treatment for [T.D.].
>
> 6. The greatest difference in testimony between the parties, relates to their observations of [T.D.] when he is in their respective physical custody. Mother testified that [T.D.] is exhibiting certain behaviors that Father testified do not occur when [T.D.] is in his physical custody. Mother testified that she believed that during the course of these proceedings that [T.D.]'s behavior and demeanor has improved, since he started taking Ritalin.
>
> 7. Father testified that it was his opinion that [T.D.] was exhibiting these characteristics in Mother's presence, due to Mother's lack of attention and concern toward [T.D.], and Father did indicate that since these legal

proceedings had been initiated, he believed that Mother was spending considerably more time and attention to [T.D.].

8. The evidence showed that Father and Mother have disagreed over how best to help [T.D.] with behavior and medical issues. Mother and Father's communication difficulties have been at least a part of this disagreement.

9. Unfortunately it took this litigation and the involvement of attorneys to help the parties obtain additional medical assistance regarding [T.D.]'s problems. After Dr. Adinamis [sic] saw [T.D.], he was also prescribed Ritalin in addition to Tenex by his doctor, Dr. Stigler. Although the parties do not agree upon the degrees of improvement, both Mother and Father agree that they have seen improvement in [T.D.]'s attention level and performance in school.

10. The reports of Dr. Hunnicutt reference the problem of both children "feeling in the middle between the parents," and again underscore the conclusion that joint custody has not proven to be in the best interests of the children in this case.

11. On May 23, 2005, the Marion County Domestic Relations Counseling Bureau issued this Report to this Court, after completing its custodial study, including interviews with both parties and their children. The Report recommends maternal custody of the children, with father having parenting time with the children in excess of Guidelines, namely that David have the children with him on alternate weeks from Friday evening to Monday morning, and have one overnight with the children each week.

12. Mother testified that she has some concern with this recommendation because the children have experienced significant stress and difficulty when with Father in getting ready for school on school mornings, but that she was willing to follow the DRCB recommendation in hopes that school mornings would improve with the stability of a sole custody situation.

* * * * *

II. CONCLUSIONS OF LAW

> 15. At the time of the hearing on this matter there was a law in the State of Indiana regarding modification of custody, that being Indiana Code Section 31-17-2-21 . . . .
>
> 16. That further, the factors which the Court is to consider in determining the best interest of the children as set forth in Indiana Code Section 31-17-2-8 are as follows . . . .
>
> 17. Joint legal custody, as defined in I.C. 31-17-2-15, is not an appropriate form of legal custody in this case. Mother shall retain sole legal custody of the parties' children.
>
> 18. Considering the evidence and I.C. 31-17-2-8, it is in the best interests of the children for Mother to have sole physical custody.
>
> 19. Father shall have parenting time pursuant to the Guidelines. In addition, Father's midweek parenting time shall be over night and his every other weekend parenting time shall extend to Monday morning.

Appellant's Br. pp. 32-36.

I. David's Petition to Modify Legal Custody

David first contends that the trial court abused its discretion by denying his petition to modify legal custody and award him sole legal custody of H.D. and T.D. As the petitioner seeking a modification of legal custody, David bears the burden of demonstrating that the existing custody arrangement should be altered. Apter v. Ross, 781 N.E.2d 744, 758 (Ind. Ct. App. 2003), trans. denied. "[I]t is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Rea v.

Shroyer, 797 N.E.2d 1178, 1181 (Ind. Ct. App. 2003). We conclude that the evidence supports the trial court's decision to deny David's petition.

A court may not modify a child custody order unless the modification is in the best interests of the children and there is a substantial change in one or more of the factors set forth in Indiana Code Section 31-17-2-8. Those factors are:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> > (A) the child's parent or parents;
> >
> > (B) the child's sibling; and
> >
> > (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to the child's:
>
> > (A) home;
> >
> > (B) school; and
> >
> > (C) community.
>
> (6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic violence by either parent.

With respect to legal custody, the welfare of the children, not the wishes and desires of the parents, is the primary concern of the courts. Carmichael, 754 N.E.2d at 635. Further, stability is a crucial factor which trial courts must take into account when determining the best interests of a child in the context of a custody modification. Harris v. Smith, 752 N.E.2d 1283, 1288 (Ind. Ct. App. 2001).

Here, David's petition alleged the substantial change that necessitated modifying legal custody of H.D. and T.D. is, "the Mother interferes with the children's medical attention for no apparent reason other than to demonstrate her custodial right over the Father." Appellant's App. p. 96. Specifically, David contends that Sara refused his efforts to have T.D. tested for a learning disability prior to T.D.'s beginning kindergarten and that Sara similarly refused David's requests to obtain a second opinion related to T.D.'s diagnosis when David believed that T.D.'s medication regimen was inappropriate. David cites no examples of alleged interference on Sara's part with regard to any medical treatment H.D. may have or may be receiving.

Indeed, the record clearly indicates that David and Sara espoused different opinions as to when or if T.D. should undergo an assessment for a learning disability—Sara wanted to wait until T.D. began kindergarten in order to benefit from T.D.'s teacher's expertise, and David preferred to act more swiftly. However, there is no evidence that Sara's preferred course of action, which eventually prevailed, adversely impacted T.D.'s health or best interests.

At the recommendation of T.D.'s kindergarten teacher and other professionals from his elementary school, T.D. was taken for an evaluation at Riley Hospital for

Children. Dr. Kimberly Stigler diagnosed T.D. with Pervasive Developmental Disorder Not Otherwise Specified ("PDD/NOS") and prescribed Tenex to manage T.D.'s behavioral problems.

Subsequently, David became dissatisfied with Dr. Stigler's diagnosis and recommended medication and asked Sara to seek a second opinion for T.D. David and Sara obtained a second opinion from Dr. Ademanis after the trial court granted David's emergency petition for a second medical opinion. Dr. Ademanis agreed with Dr. Stigler's diagnosis and treatment plan for T.D. Dr. Ademanis did, however, suggest that the medication Ritalin be added to T.D.'s drug regimen. This medication was prescribed, and T.D. continues to treat with Dr. Stigler.

Despite David and Sara's differences of opinion with regard to T.D.'s treatment, they both testified that they have observed positive changes in T.D. since he began treatment for his PDD/NOS symptoms. There is no evidence that indicates T.D. was adversely affected by Sara's decision to delay his evaluation until after beginning kindergarten, and there is no evidence that Sara's alleged interference with T.D.'s medical treatment posed a threat to T.D.'s health and welfare. David has not overcome his burden of proving that it is in H.D.'s and T.D.'s best interests to grant David sole legal custody.

Finally, maintaining Sara's role as sole legal custodian helps provide stability for H.D. and T.D. For the past six years, Sara has been the parent who oversees and makes legal decisions related to the children. To alter whatever processes or procedures Sara has in place for making such decisions by granting David sole legal custody would

undoubtedly result in some changes that would impact H.D. and T.D. The trial court's refusal to grant David sole legal custody is not clearly erroneous.

David has further failed to establish a substantial change in one of the factors set forth in Indiana Code Section 31-17-2-8. In fact, on appeal, David does not allege that a substantial change has taken place with regard to the statutory factors. Instead, he merely argues that Sara failed to act in Tom's best interests. David has not met his burden of showing a substantial change in circumstances.

Finally, we note that the trial court concluded joint legal custody is not an appropriate option in this case. "[W]e have held that 'if the parties have made child-rearing a battleground, then joint custody is not appropriate.'" Carmichael, 754 N.E.2d at 635. (quoting Periquet-Febres v. Febres, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995), trans. denied.). There is overwhelming evidence here of the parties' inability to effectively communicate and cooperate concerning H.D. and T.D.'s upbringing.

Each party testified that the other is to blame for the lack of communication between them. David testified that Sara "[s]poradically" responds to his e-mails. Tr. p. 62. Sara testified that David "doesn't answer his phone" when she calls him. Tr. p. 229. Despite their mutual finger pointing, David and Sara appear to agree that, as David testified, their relationship is "pretty conflicted," tr. p. 61, and "the arrangement is not working." Tr. p. 19. The evidence amply supports the trial court's conclusion that joint legal custody is inappropriate in this case.

II. Sara's Petition to Modify Physical Custody

With regard to the petition to modify physical custody, Sara has the burden of proving that modification is in H.D. and T.D.'s best interests and there has been a substantial change in one or more of the Indiana Code Section 31-17-2-8 factors. We conclude that the evidence supports the trial court's decision to grant Sara sole physical custody.

One of the factors to consider is the age of the children. In this case, David and Sara's joint physical custody arrangement was put in place in June 2000 when H.D. was six years old and T.D. was two years old. H.D. and T.D. are now twelve and eight years old, respectively. In the six years that have passed since the original custody determination, H.D. has made the transition from an elementary school student to a pre-teen, and T.D. has grown from a toddler to a full-day student. There can be no doubt that in the last six years, both children have become more perceptive of the world around them and more sensitive to other people's feelings and conflicts, particularly those involving their parents.

As we have already concluded, there is copious evidence of David and Sara's inability to communicate effectively and of the conflict between them. There is also ample evidence that this antagonism is negatively affecting H.D. and T.D.

David testified:

> The reason I'm here today is basically to address the issue of conflict between the parents and how it's affecting the kids. They have been affected or are being affected by—it seems to not have dramatically affected them, but it sure shows signs that it's coming to a head, or it's showing more signs of the conflict between Sara and myself seems to be more affecting them . . . .

Tr. p. 15. He further testified that the "conflicted environment in which [H.D. and T.D.] live puts an emotional strain on the children." Id. at 87.

Sara echoed David's concerns about the children living in a conflicted environment and testified that the parties' communication problems have "negatively impacted the children." Id. at 187. In particular, Sara cited examples of the children missing extracurricular activities or returning school library books long after they were due as a result of the parties' failure to communicate. Sara also testified that H.D. is "anxious, she's stressed, she's stressed." Id. at 206.

In addition to the parties' testimonies, the May 23, 2005 report prepared by the Domestic Relations Counseling Bureau ("DRCB") highlights the conflict between David and Sara.[1] The report specifically notes that H.D. "has difficulty sleeping in her own bed at mother's house," and recommends the custody/parenting time arrangement ultimately ordered by the trial court. Ex. 2, p. 6. The DRCB report further states that both David and Sara "agree the current custody and parenting time arrangement is not acceptable," but acknowledges that David and Sara provide different reasons for that conclusion. Id. at 3. Given the continued strife between David and Sara, we believe that the children's increased abilities to perceive and internalize this conflict as they have grown constitutes a substantial change in circumstances since the custody arrangement was first established

[1] In his appellant's brief, David asserts that "the DRCB report is not evidence. While the recommendations of the DRCB are allowed to rest on hearsay, that in and of itself does not convert otherwise inadmissible hearsay evidence into evidence that the Court can rely on for its judgment." Appellant's Br. p. 16. We note that at the time the May 23, 2005 DRCB report was offered into evidence, David specifically stated, "As to the May 23rd, 2005, we have no objection." Tr. p. 85. He may not now challenge the admissibility of that report.

six years ago. Although our custody modification statute only requires that the evidence show a substantial change in one of the statutory factors, we note that H.D. indicated to the DRCB that she wants to spend more time at her mother's home.

We further believe that the modification of physical custody is in H.D.'s and T.D.'s best interests. We note that the original custody arrangement—where Sara had sole legal custody and the parties had joint physical custody—became difficult to manage. In this case, the arrangement, at least now that the children have gotten older, clearly is not working. We already have determined that the trial court properly denied David's petition to modify legal custody, maintaining Sara's role as sole legal custodian. It makes practical sense then, for Sara to also have sole physical custody. Hopefully, this arrangement will help eliminate much of the bickering and bitterness between David and Sara and, in turn, will have a positive effect on H.D. and T.D. as well. The trial court did not err by granting Sara sole physical custody.

III. Indiana Code Section 31-17-4-2[2]

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[2] We assume this is the statute on which David intended to rely. In his table of contents, summary of the issues, and the first portion of the argument section as it relates to this issue, David provides us with a citation to Indiana Code Section 31-17-4-1. In the body of his argument related to this issue, however, David several times cites to Indiana Code Section 31-17-4-2.

Both of these statutes discuss limiting a noncustodial parent's parenting time where that parenting time might endanger the children's physical health or delay their emotional development. Specifically, Indiana Code Section 31-17-4-1(a) provides: "A parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." Despite this language, which is similar to the language found in Indiana Code Section 31-17-4-2, Indiana Code Section 31-17-4-1 specifically discusses the in camera review procedure a trial court may employ in making the determination of physical harm or emotional impairment. Indiana Code Section 31-17-4-2, on the other hand, simply sets forth the general standard the trial court must apply when deciding to restrict a parent's parenting time. Because there is no argument related to an in

David next contends that the trial court's decision to grant Sara sole physical custody was in error because the trial court failed to apply the standard set forth in Indiana Code Section 31-17-4-2. We conclude that David has waived this issue because he has failed to provide us with citation to authorities supporting his assertions as mandated by Indiana Appellate Rule 46(A)(8)(a).

Indiana Code Section 31-17-4-2 provides:

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.

David contend that this standard, and not the standard set forth in Indiana Code Sections 31-17-2-8 and 31-17-2-21, governs this case because when he and Sara shared joint physical custody, neither party could be defined as the custodial or non-custodial parent. Instead, David posits, both he and Sara had defined parenting time. He hypothesizes that because the new custody arrangement affords him less time with his children than he previously had, his parenting time has been restricted or reduced, a situation governed by Indiana Code Section 31-17-4-2. Pursuant to that statute, then, David contends that the trial court should have determined whether his parenting time

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camera interview with H.D. and T.D. in this case, and because this is the statute he repeatedly cites in the body of his argument, we assume that David intended to cite to Indiana Code Section 31-17-4-2.

We further note that, in her appellee's brief, Sara, too, cites to and quotes from Indiana Code Section 31-17-4-1 and clearly structures her argument around this statute. Even though we choose to analyze this issue in light of Indiana Code Section 31-17-4-2, we believe that Sara's arguments carry over to that statute as well and that she is in no way put at a disadvantage given that both statutes discuss the possibility of parenting time endangering children's health or impairing their emotional development.

"might endanger the child's physical health or significantly impair the child's emotional development." Ind. Code § 31-17-4-2. Because it did not do so, David believes the trial court erred.

Although David does cite two cases in his discussion of this issue, neither supports those contentions. Instead, his citations stand for the general propositions that 1) when construing statutes, the words and phrases used therein must be given their plain, ordinary meanings, and 2) that parenting time may not be restricted absent a finding by the trial court that the child's physical or emotional health is in danger. See Appellant's Br. p. 24 (quoting State v. Eilers, 697 N.E.2d 969, 970 (Ind. Ct. App. 1998), Barger v. Pate, 831 N.E.2d 758, 763 (Ind. Ct. App. 2005)). Neither of these citations supports David's contention that the standard set forth in Indiana Code Section 31-17-4-2 governs the custody modification at issue in this case. This issue is therefore waived.

IV. Limitation on Sara's Authority as Legal Custodian

Finally, David contends that the trial court erred by failing to treat David's petition for custody modification as a request for a restriction on Sara's authority as the legal custodian. David has waived this issue.

> A party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court. This rule protects the integrity of the trial court, which should not be found to have erred as to an issue or argument that it never had an opportunity to consider.

Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), trans. denied.

David seems to concede that he failed to request a restriction on Sara's authority as H.D. and T.D.'s legal custodian.[3]

David also has failed to make an argument supported by cogent reasoning and citation to authorities with regard to this issue as required by Indiana Appellate Rule 46(A)(8)(a). Indiana Code Section 31-17-2-17(b)[4] provides: "If the court finds after motion by a noncustodial parent that, in the absence of a specific limitation of the custodian's authority, the child's: (1) physical health would be endangered; or (2) emotional development would be significantly impaired; the court may specifically limit the custodian's authority." (Emphasis added).

Despite this statute's clear mandate that a trial court may limit the custodian's authority following a motion, David contends that, "Even though [he] did not request a restriction on the authority of the legal custodian, the Court has the authority to grant relief commensurate with the evidence." Appellant's Br. p. 27. We regard this statement as a contention that the trial court had the power to, sua sponte, limit Sara's authority as the legal custodian. However, David provides us with no citations to any cases that support this position. We will not address the argument.

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[3] Although David appears to concede on page twenty-seven of his appellant's brief that he "did not request a restriction on the authority of the legal custodian," he states on page twenty-eight of that brief, "The Court also had the option of placing a restriction on Mother's authority as sole legal custodian, and David raised some such restrictions in his initial pleadings." David does not provide us with a citation to support this contention. We have scoured David's October 15, 2004 petition for custody modification, however, and are unable to find any reference to the restrictions on Sara's authority to which David refers.

[4] We again assume this is the statute upon which David relies in making this argument. Although in the argument portion of his brief he refers to Indiana Code Section 31-17-4-2(b), he actually quotes Indiana Code Section 31-17-2-17(b). See Appellant's Br. p. 27. He also references the latter statute in his summary of the arguments, so we assume this is the statute he intended to cite in his argument as well.

Conclusion

The trial court did not err by denying David's request to modify legal custody or by granting Sara's request for sole physical custody. The evidence supports the trial court's judgment in these regards. David has not provided us with any authority to support his contention that Indiana Code Section 31-17-4-2 governs this custody modification. By failing to request that the trial court treat his request for custody modification as a request to limit Sara's authority as the legal custodian, David has waived this issue as well. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.